

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION TO)
SEVER OR SELL APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. 14,607-ss76LJ BY ASHLEY)
IRRIGATION DISTRICT)

The Ashley Irrigation District, hereinafter cited as A. I. D., on August 31, 1977 filed with the Montana Department of Natural Resources and Conservation (hereinafter D.N.R.&C.) an Application to Sever and Sell Water Right No. 14,607-ss76LJ. Each purchaser of the A. I. D. water rights filed an Application for Change of Appropriation Water Right. The A. I. D. proposed to sell the water rights to a consortium, composed of individuals, corporations and governmental entites. The purchasers of the A. I. D. Water Right No. 14,607-ss76LJ are: Ashley Creek Ranch, Inc.; Dave Buckalew; Conrad Land and Cattle, Inc.; Frank and Douglas Gamma; Art Hanson; Harrington and Bibler, Inc.; John V. and Kent Hyrup; Keith W. Kiser; Richard C. Lienesch; L. Bernard Lund; Wilson and Vivian Managhan; Dale Seelye and Owens; Gary and Ewald Zorn; Ewald Zorn and Carolyn Miller; United States Fish and Wildlife Service; and the Montana Department of Fish, Wildlife and Parks. Applications for Change of Appropriation Rights submitted by intended purchasers the City of Kalispell and Flathead County were withdrawn December 7, 1978. The portion of water to be purchased by Flathead County and the City of Kalispell was transferred to the Department of Fish,

Wildlife and Parks, which increased the volume of water it purchased. An Application for Change of Appropriation Water Right submitted by Tim Rose was transferred to the Hyrups when the Hyrups purchased Rose's land.

Public Notices of the Application to Sever and Sell Water Right No. 14,607-ss76LJ by A. I. D. and the concomitant Applications for Change of Appropriation Water Rights by the purchasers were published in the Daily Inter Lake, Kalispell, Montana, on February 1, 8 and 15, 1978. Objections to the Applications were filed with D.N.R.C. by April 12, 1978. Objections to the A. I. D. Application to Sever and Sell, and all Applications for Changes of Appropriation Rights were filed by: Howard Armstrong; William J. and Leonard R. Bergstrom; Mr. and Mrs. Don Burgau; Harold M. and Agnes M. Gustafson; Pamela Jeffcock; Robert L. and Linda J. Miller; Robert L. Monk; Montana Power Company; Lawrence E., Charles H. and Wynona O'Neil; and James Sappington. The Kalispell Christian Church, Mr. and Mrs. Virgil D. McNeil, Mr. and Mrs. C. Eugene Phillips and Thomas W. and Jeanne C. Trumball objected only to the Application for Change of Appropriation Water Right filed by Harrington and Bibler, Inc. Orville Thomas Stuard and Leona Stuard objected to the Application for Change of Appropriation Water Right filed by Frank and Douglas Gamma.

The D.N.R.C. completed the Preliminary Environmental Review and Technical Report, September, 1979. Since the

Preliminary Environmental Review concluded that an Environmental Impact Statement was not required, Hearing Examiner Richard Gordon ordered on October 4, 1979, that all applicants submit written direct testimony with the Hearing Examiner by October 24, 1979. At the request of F. Woodside Wright, Attorney for the Montana Department of Fish and Wildlife and Parks, the deadline for filing written direct testimony was extended to November 5, 1979. Richard Gordon resigned from D.N.R.C., and on November 28, 1978, Ronda L. Sandquist was appointed Hearing Examiner, and substituted without objection. The objectors were mailed copies of the applicant's written direct testimony. The Objectors were ordered to submit written direct testimony by December 19, 1979. On her own motion, the Hearing Examiner held a pre-hearing conference on February 6, 1980.

The hearing was held on February 20, 21 and 22, 1980 in the Council Chambers of the Kalispell City Hall.

At the pre-hearing Mr. Sappington made a motion that the Sever and Sell of Water Right No. 14,607-ss76LJ was not a dissolution of Ashley Irrigation District because it was not a sale of all of the assets of Ashley Irrigation District. The Hearing Examiner ruled at the hearing that D.N.R.C. did not have a jurisdiction over the dissolution of A. I. D., such jurisdiction being properly vested in the District Court.

The Ashley Irrigation District was represented at the hearing by legal counsel, Kenneth E. O'Brien, Esq., from the law firm of Hash, Jellison, O'Brien & Bartlett, Kalispell, Montana. Submitting written direct testimony and personally appearing on behalf of the Ashley Irrigation District to present evidence and testimony were Fred Hansen and Carl Grosswiler.

The Montana Department of Fish Wildlife and Parks (F.W.&P.) was represented by legal counsel, F. Woodside Wright, Chief Legal Counsel for the Department of F.W.&P. Submitting written direct testimony and personally appearing on behalf of the F.W.&P. to present evidence and testimony were Thomas R. Hay and Robert E. Schumacher.

F.W.&P. presented two (2) exhibits: (1) a contour map of Ashley Lake, and (2) a Notice of Water Right for twenty thousand (20,000) miner's inches of water from Ashley Creek claiming a priority date of 1897, filed by Water Jaquette, et al., in Flathead County, Book of Water Right Locations, page 313. Said exhibits were marked as F.W.&P. Exhibit Nos. 1 and 2, respectively, and admitted into the record.

Dave Brant, President of Ashley Creek Ranch, Inc., presented written direct testimony and personally appeared to present evidence and testimony on behalf of the Ashley Creek Ranch.

Gordon Conrad presented written direct testimony and personally appeared to present evidence and testimony on behalf of the Conrad Land and Cattle Co.

Frank Gamma, on his own behalf, presented written direct testimony and personally appeared to present evidence and testimony.

Art Hanson, on his own behalf, presented written direct testimony and personally appeared to present evidence and testimony.

Harrington and Bibler, Inc., was represented by legal counsel Stephen Berg, from the law firm of Warden, Christianson and Johnson, Kalispell, Montana. Submitting written direct testimony and personally appearing to present evidence and testimony on behalf of Harrington and Bibler, Inc., were: Sam Bibler and Allen Tudor.

John V. and Kent Hyrup were represented by legal counsel Charles R. White, Kalispell, Montana. Kent Hyrup submitted written direct testimony and personally appeared to present evidence and testimony.

Keith Kiser, on his own behalf, presented written direct testimony. Mr. Kiser presented one exhibit: The U.S. Department of the Interior Map of the Smith Waterfowl Production Area, indicating Kiser's diversion point and lands

to be irrigated. The exhibit was admitted and entered into the record as Kiser Exhibit No. 1.

Wilson Managhan, on his own behalf, presented written direct testimony and personally appeared to present evidence and testimony.

Dale Seelye, on his own behalf, submitted written direct testimony. Dale Seelye did not appear at the hearing for cross-examination, therefore, Dale Seelye's written direct testimony was struck from the record. Wilson Managhan appeared on behalf of Dale Seelye to answer questions about Dale Seelye's planned uses of the water.

The United States Fish and Wildlife Service (U.S.F.&W.S.) was represented by legal counsel Gerald Moore, from the Office of the Solicitor, U. S. Department of the Interior, Billings, Montana. Personally appearing to present evidence and testimony on behalf of the U. S. F. & W. S. was Robert C. Brown. At the hearing the U.S.F.&W.S. presented an amended Application for Change of Appropriation Water Right, and written direct testimony of Robert C. Brown. The U.S.F.&W.S. presented one exhibit, a map of the Smith Lake Waterfowl Production Area with indications of lands to be irrigated. The exhibit was admitted and entered into the record as U.S.F.&W.S. Exhibit No. 1.

Richard C. Lienesch, M.D., on his own behalf, presented written direct testimony and personally appeared to present

evidence and testimony. Dr. Lienesch presented one exhibit, a map of his property in Section 14, Township 28 North, Range 22 West. The exhibit was admitted and entered into the record as Lienesch Exhibit No. 1.

L. Bernard Lund, on his own behalf, submitted written direct testimony and personally appeared to present evidence and testimony.

David L. Buckalew, on his own behalf, submitted written direct testimony and personally appeared to present evidence and testimony.

Ewald Zorn and Gary Zorn submitted written direct testimony, but neither appeared at the hearing. Since Ewald Zorn and Gary Zorn were not available for cross-examination, their direct written testimony was struck from the record.

Ewald Zorn and Carolyn Miller submitted written direct testimony, but neither appeared at the hearing. Since Ewald Zorn and Carolyn Miller were not available for cross-examination, their direct written testimony was struck from the record.

Objector James Sappington, on his own behalf, submitted written direct testimony and personally appeared to present evidence and testimony. Mr. Sappington presented one exhibit; Application for Beneficial Water Use Permit submitted to D.N.R.C. by Mr. Sappington on February 13, 1980,

requesting a permit to appropriate three hundred (300) gallons of water per minute up to a maximum of one hundred and ten (110) acre-feet of water per year from the Ashley Irrigation Ditch. The exhibit was entered into the record as Sappington Exhibit No. 1.

Objector Harold Gustafson, on his own behalf, submitted written direct testimony and personally appeared to present testimony.

Objector Charles O'Neil was represented by legal counsel Stephen Berg, from the law firm of Warden, Christianson and Johnson, Kalispell, Montana. Mr. O'Neil presented one exhibit, a copy of an Agreement between the Ashley Irrigation District and several persons, dated October 30, 1930 and recorded October 18, 1935. The exhibit was admitted and entered into the record as O'Neil Exhibit No. 1.

Objectors, the Kalispell Christian Church and Mr. and Mrs. Virgil McNeil were represented by legal counsel, James Weaver, Columbia Falls, Montana. The Kalispell Christian Church and the McNeils submitted written direct testimony. At the request of the Church and the McNeils, their case and cross-examination of Harrington and Bibler, Inc., was conducted at the hearing on Harrington and Bibler Application for Beneficial Water Use Permit No. 17,743-s76LJ and Application for Change of Appropriation Water Right No. 15,948-c76LJ held on February 25, 1980. Virgil D. McNeil and

John L. Mulford personally appeared to present evidence and testimony on behalf of the Church and McNeils. The proceedings of the hearing on the Application for Beneficial Water Use Permit No. 17,743-s76LJ and Application for Change of Appropriation Water Right No. 15,948-c76LJ, by Harrington and Bibler, Inc., were fully adopted and incorporated into the proceedings on the Application to Sever and Sell water Right No. 14,607-ss76LJ, particularly the Application for Change of Appropriation Water Right by Harrington and Bibler.

Members of the Department of Natural Resources and Conservation present at the hearing were Glenn Smith, Roger Noble, Larry Brown, Arlin Krogstad and Jim Rehbein.

Members of the public presenting testimony at the hearing were Mrs. Dale Whitehead, Donald R. Adams, and John Zauner, Jr.

F. Woodside Wright, on behalf of the applicants, requested that the hearing remain open until an Amended Purchase and Management Agreement was signed by all applicants and presented. The motion was granted. The Amended Purchase and Management Agreement was received March 19, 1980. The parties were granted until April 15, 1980 to submit Proposed Findings of Fact and Conclusions of Law. Replies to the Proposed Findings of Fact and Conclusions of Law were submitted on May 12, 1980.

Based upon the Department's file, the applicants' and objectors' testimony presented and exhibits admitted, the Hearing Examiner hereby makes the following Proposed Findings of Fact:

PROPOSED FINDINGS OF FACT

1. The Hearing Examiner does not have the authority to adjudicate water rights and is not attempting to adjudicate water rights, therefore, for the purposes herein only, it is determined the A. I. D. has valid water right claims as follows:

a. Notice of Appropriation for 500 cubic feet of water per second from Ashley Lake with a priority date of August 15, 1910, filed in Flathead County, Water Rights Book 71, page 425;

b. Notice of Appropriation for 125 cubic feet of water per second from Ashley Creek with a priority date of August 15, 1910, filed in Flathead County, Water Rights Book 71, page 426;

c. Notice of Appropriation (by Walter Jacquette) for 5000 miners inches of water from Ashley Creek with a priority date of March 6, 1897, filed in Flathead County, Water Rights Book 16, page 312; and

d. Notice of Appropriation (filed by Walter Jaquette) for 20,000 miner's inches of water from Ashley Creek with a priority date of February 1, 1897, filed in Flathead County, Water Rights Book 16, page 313.

2. The Hearing Examiner does not have the authority to adjudicate water rights and is not attempting to adjudicate water rights, therefore, for the purposes herein only it is determined that the A. I. D. has historically used approximately 19,318 acre-feet of water, with a maximum flow rate of 125 cubic feet of water per second, from Ashley Lake and Ashley Creek.

3. Ashley Lake has a surface area of 2862.3 acres at full pool with an average depth of six feet, therefore Ashley Lake impounds approximately 17,000 acre-feet of water. Of the 17,000 acre-feet of water in Ashley Lake, approximately 11,000 acre-feet of water is usable storage. (Schumacher, TR., page 59). The water in Ashley Lake is stored from January 1 to December 31, inclusive, of each year. (Application).

4. The point of diversion on Ashley Lake is at the NW1/4 NW14 NE1/4, Section 23, Township 28 North, Range 24 West, M.P.M., Flathead County. The diversion works are a dam and three headgates.

- a. The dam is approximately twelve feet high and five feet wide, and is constructed of cement. (Grosswiler, TR., page 43).
- b. Each of the three headgates is seven feet high and five feet wide, and constructed of cement. The District only used one of the headgates for releasing water. (Grosswiler, TR., page 43).
- c. The gate and rigid flashboards have been overtopped by high water, which has caused the gunnite coating on portions of the concrete to erode. The slab beneath the gate is reported to be solid. (Dam Safety Inspection Report).
- d. Debris has previously accumulated across the inlet channel; a large log crosses the inlet channel. Either may interfere with operation of the controls. A steel trashrack or floating log boom were recommended solutions. (Dam Safety Inspection Report).
- e. There is no spillway in the Ashley Dam structure. There may be a need for an emergency spillway to be constructed to handle floods. Representatives of F. W. & P. testified that they intended to install a spillway on Ashley Lake. (Dam Safety Inspection Report, and Hay, TR. page 47).

5. The A. I. D. used the waters from Ashley Lake and Ashley Creek, totaling 19,318 acre-feet or 125 cubic feet of water per second, from approximately April 1 through December 1 of each year, although that is the longest period of use, and for average years the water was used from early or mid-May through mid or late-October. (Hanson, TR. page 14; Grosswiler, TR., page 37).

6. In addition to the approximately 11,448 acre-feet of water stored and released from Ashley Lake into Ashley Creek, approximately 7,870 acre-feet of water to 8,750 acre-feet of water from Ashley Creek has been sold by A. I. D. and used for irrigation and stockwater.

7. The point of diversion from Ashley Creek, into the A. I. D. ditch, is at the NW1/4 NW1/4 of Section 21, Township 28 North, Range 22 West, from which a point thereon the A. I. D. ditch meanders through the bench, being the SE1/4 SW1/4 to NE1/4 SE1/4 of Section 16 to NW1/4 of Section 15, SW1/4 to SW1/4 NW1/4 of Section 10, to NE1/4 NE1/4 Section 9, to SE1/4 to NE1/4 NW1/4 Section 4, all in T. 4 N., R. 22 W., and to SW1/4 to NE1/4 NE1/4 of Section 33 to SE1/4 SE1/4 of Section 28, to SW1/4 SW1/4 of Section 26, to NW1/4 NE1/4 of Section 35 to NW1/4 NW1/4 to SW1/4 SE1/4 of Section 36, all in T. 29 N., R. 22 W., and to NW1/4 NE1/4 of Section 1 of T. 28 N., R. 22 W., and through NW1/4 NW1/4 to NE1/4 SW1/4 of Section 6, T. 28 N., R. 21 W.

a. The A. I. D. ditch is approximately 11.75 miles long and has a capacity of 75 cubic feet of water per second. (Water Resources Survey for Flathead and Linedn, page 43).

b. The A. I. D. ditch leaked badly in the NE1/4 SE1/4 of Section 16, Township 28 North, Range 22 West and SW1/4 NW1/4 of Section 15 to the NE1/4 of Section 9, and portions of Section 10 so the ditch was lined with betonite and cement in places. (Hansen, TR. page 25; and Grosswiler, TR., page 28-39).

8. The A. I. D. appropriated the water for irrigation of approximately 1200 to 3500 acres of land and stockwater for approximately 1,943 head of livestock.

a. The application stated that A. I. D. had previously irrigated approximately 2,658 acres and provided stockwater for 1,943 animals.

b. The Water Resources Survey for Flathead and Lincoln Counties (1965) reported that 2,658.588 acres were irrigated by A. I. D., with a potential to increase acreage irrigated to a total of 3,072.988 acres. (Report, page 43).

c. A representative of A. I. D. testified that 1300 to 1500 acres were irrigated. Another representative of A. I. D. testified that approximately 1200 acres had been

flood irrigated, but because of changes to sprinkler irrigation approximately 3500 acres were irrigated.

(Hansen, TR., page 15; Grosswiler, TR., pages 39-40).

9. The A. I. D. has historically used the water from Ashley Lake and Ashley Creek to irrigate portions of Sections 1, 2, 4, 9, 12 and 15 in Township 28 North, Range 22 West, portions of Sections 26, 27, 34 and 35 in Township 29 North, Range 22 West, and portions of Section 6, Township 28 North, Range 21 West.

a. Water, when available, was also sold to property owners along the canal for domestic gardens. (Hansen, TR., pages 20-21).

b. Water in Ashley Lake had to be released in July and August for two weeks before the flows would be adequate to reach irrigators along ditch. (Grosswiler, TR., pages 40, 42).

c. Water released from Ashley Lake entered Smith Lake, the level of Smith Lake had to raise two inches before there would be a two inch increase in water in the ditch. Portions of Smith Lake were dredged in 1917-1918. (Grosswiler, TR., page 42).

10. The A. I. D. entered into an Agreement in 1930 with parties that had appropriation rights to the natural flow of Ashley Creek that were prior in time to the A. I. D.

appropriation rights. The A. I. D. agreed that during water shortages water would be released from Ashley Lake and apportioned among prior appropriators and A. I. D. in proportion to their irrigable acreage. (Objector, O'Neil, Exhibit No. 1).

a. Objectors, Lawrence E. O'Neil, Charles H. O'Neil and Wynona M. O'Neil, claimed to be the successors in interest to two water rights from Ashley Creek with priority dates of 1890 and 1896. (Objection).

b. A representative of the A. I. D. contended the Agreement had not been complied with by the A. I. D. since the 1940's. (Grosswiler, TR., page 45).

11. A. I. D. petitioned for dissolution. The District Judge ordered that A. I. D. sale all of its assets, including the water rights. The Department of Fish, Wildlife and Parks (FW&P) decided to purchase part of the water and advertised for other purchasers. FW&P and assorted purchases entered into a Purchase and Management Agreement of 1977. The Purchase and Management Agreement was amended on March 4, 1980.

a. Objectors contended that the sale of the water rights was conducted in an unfair and unjust manner.

b. The Purchase and Management Agreement provides for FW&P to regulate and control the releases of water from

Ashley Lake, and for approximately the waters of Ashley Lake and Ashley Creek amongst the purchasers, especially during droughts or water shortages.

12. The purchasers of A. I. D. water rights will only divert water in the A. I. D. ditch to the Deist property, the NW1/4 of Section 15, Township 28 North, Range 22 West. At the Deist property the A. I. D. will be blocked so water will not be transferred further through the ditch.

a. The Objectors contended that "abandoning" the remaining portion of the ditch would diminish the value of the Objector's property located along the ditch.

b. The representatives of the A. I. D. testified that the A. I. D. intended to transfer the easements for the "abandoned" portions of the ditch to the owners of the property adjacent to the ditch.

c. Objector Sappington contended that water should remain in the A. I. D. ditch for owners of property riparian to the ditch to appropriate, use, and aesthetically enjoy. (Sappington, TR., pages 343-348).

13. Ceasing water flows in the H. I. D. ditch beyond the NW1/4 of Section 15, which has been used for approximately 60 years and developed riparian vegetation along its banks, will not have significant adverse affects on the environment. (Preliminary Environmental Report).

a. The transfer of water rights will have moderate to major beneficial impacts because the riparian vegetation along Ashley Creek will be improved, fish mortality rates in Ashley Creek will be decreased and increased flows will dilute the sewage in Ashley Creek.

b. An adverse affect may occur if lands in the Ashley Creek drainage with a potential for saline seep are irrigated, sub-irrigated or flooded by increased flows from Ashley Creek. The potential saline seep lands were not specifically located.

c. Leakage from the A. I. D. ditch may have insignificantly contributed to the shallow groundwater aquifers surrounding the ditch, and if so, the discontinuation of flows in the A.I.D. ditch may have minor impacts on the shallow groundwater aquifers.

d. Representatives of the FW&P testified on cross-examination that wildlife and birds may have used the A.I.D. ditch for watering, but believed that any loss of water to animals on A.I.D. ditch would be outweighed or balanced by the availability of sustained flows in Ashley Creek.

14. The FW&P proposes to purchase 9,540 acre-feet of , water from Ashley Lake to be stored from January 1 through December 31, inclusive, of each year.

a. The FW&P would use the stored waters of Ashley Lake from January 1 through December 31, inclusive, or each year. (Application).

b. The FW&P would only withhold waters to increase storage in Ashley Lake during those periods when the quantity of water available exceeds the needs of downstream prior appropriators. (Hay, TR., page 48).

15. The FW&P will divert the water by the dam and headgate structure, described in Proposed Findings of Fact No. 4, on Ashley Lake. The point of diversion for Ashley Lake is the NW1/4 NW1/4 NE1/4 of Section 23, Township 28 North, Range 24 West. (Application).

16. The FW&P would release 9,540 acre-feet of water from Ashley Lake to maintain adequate flows in Ashley Creek for fish habitat, particularly the spawning and propagation of fish populations.

a. Waters will be released from Ashley Lake to simulate natural flows of the creek. The flows of the Thompson River will serve as a model for flows in Ashley Creek. (Schumacher, Direct, page 5).

b. Releases of water from Ashley Lake into Ashley Creek will provide recreation opportunities and dilute sewage discharges.

17. The FW&P proposes to purchase 1,908 acre-feet of water per year from Ashley Lake to be stored from January 1 through December 31, inclusive, of each year. (Application).

a. The FW&P would use the stored water in Ashley Lake, from January 1 through December 31, inclusive, of each year. (Application).

b. The FW&P would only withhold waters to increase storage in Ashley Lake during those periods when the quantity of water available exceeds the needs of downstream prior appropriators. (Hay, TR., page 48).

18. The FW&P will divert the 1,908 acre-feet of water by storing it in Ashley Lake, using the dam and headgate structures described in Proposed Findings of Fact No. 4, to control the impoundment and releases of water. The point of diversion for Ashley Lake is the NW1/4 NW1/4 NE1/4 of Section 23, Township 28 North, Range 24 West. (Application).

19. The FW&P will use the 1,908 acre-feet of water to dilute the Kalispell sewage discharges into Ashley Creek and flush Ashley Creek to its confluence with the Flathead River.

20. The place of use for the 1,908 acre-feet of water is the SW1/4 of Section 20, Township 28 North, Range 21 West, the location of the Kalispell sewage plant, and to provide flushing of Ashley Creek from that point to the Flathead River. (Application).

21. The Ashley Creek Ranch, Inc., (Dave Brant, President) requested to purchase 1800 gallons of water per minute up to a maximum of 800 acre-feet of water per year from Ashley Creek to be used from April 1 through October 1, inclusive, of each year, for irrigation and stockwater.

22. The Ashley Creek Ranch would use part of the water to provide irrigation on fields of 116.5 acres, presently irrigated with water from Ashley Creek and Haskill (Hunt) Creek.

a. The acquisition of A. I. D. water would provide the Ashley Creek Ranch with a date senior in time to the water rights the Ranch presently uses. (Brant, TR., page 117).

b. A 27.5 acre field in the SW1/4 NW1/4 of Section 23, Township 27 North, Range 23 West, would be flood irrigated.

(1) The means of diversion is a steel and wood headgate and culvert that can divert water from either Ashley Creek or Haskill Creek, located at the SW1/4 NW1/4 NW1/4 of Section 23, Township 27 North, Range 23 West. (Applicant's map; Brant, TR., page 102).

(2) The field would be irrigated four times per irrigation season, applying a total irrigation of

1.33 acre-feet of water per acre. The field requires a total volume of approximately 50 to 60 acre feet of water. (Brant, TR., page 108).

c. A 39 acre field in the SE1/4 SW1/4 of Section 15, NE1/4 NE1/4 of Section 22 and S1/2 NW1/4 NW1/4 of Section 23, all in Township 27 North, Range 23 West, would be flood irrigated.

(1) The means of diversion is a cement dam on Ashley Creek, at the NE1/4 SE1/4 SW1/4 of Section 15, Township 27 North, Range 23 West, that diverts Ashley Creek water into a ditch that flows north of Ashley Creek. (Applicant's map; Brant, TR., page 103).

(2) The field requires approximately 60 acre-feet of water per year for irrigation.

d. A 40 acre field in the NW1/4 NE1/4 and SE1/4 NE1/4 of Section 22, Township 29 North, Range 23 West, would be leveled so a border dike system for flood irrigation could be installed. (Application).

(1) The means of diversion is a sandbag dam on Ashley Creek at the NW1/4 NW1/4 NW1/4 NE1/4 of Section 22, Township 24 North, Range 23 West.

(2) The field would be leveled and a border dike flood irrigation system installed to irrigate four

times per irrigation season and apply approximately 1.33 acre-feet of water per acre. The field requires a total volume of approximately 53 acre feet of water per year. (Application; Brant, TR., page 107).

23. The Ashley Creek Ranch would use part of the water for flood irrigation of 126.5 acres in the SW1/4 NW1/4 NW1/4 of Section 24 and the SE1/4 NE1/4 of Section 23, both in Township 27 North, Range 23 West, although the land has previously been flooded and subirrigated by natural flows of Ashley Creek and high groundwater aquifers. (Application).

a. The purchase of Ashley Creek water would provide for irrigation of the land during dry years when the natural flows are insufficient to flood and sub-irrigate the field. (Brant, TR., page 117).

b. The field would be flood irrigated by applying approximately 2 acre-feet of water per acre, therefore, the total maximum volume of water necessary for flood irrigation of the field would be approximately 253.0 acre-feet of water. (Brant, TR., page 108).

24. The Ashley Creek Ranch would use part of the purchased water to sprinkle irrigate 157 acres that have not previously been irrigated. On the 46 acre, the 12 acre, and the 13 acre fields 3 inches of water will be applied by sprinklers on an 11 day rotation plan. The total volume of

water required to sprinkle irrigate these three fields is 88.75 acre-feet of water per year. The 86 acre field would be sprinkle irrigated and require a total volume of 220 acre-feet of water per year.

a. The 46 acre field in the SW1/4 SE1/4 and the NE1/4 SW1/4 of Section 15, Township 27 North, Range 23 West would be sprinkle irrigated. The means of diversion is a cement dam on Ashley Creek at the NE1/4 SE1/4 SW1/4 of Section 15, Township 27 North, Range 23 West, that diverts Ashley Creek water into a ditch that flows north of Ashley Creek. On the above-described ditch a pump will be installed at the NE1/4 SW1/4 SE1/4 of Section 15, Township 27 North, Range 23 West to divert the water onto the field.

b. The 12 acre field is in the S1/2 S1/2 S1/2 SW1/4 of Section 13 and the N1/2 N1/2 N1/2 NW1/4 of Section 24. All in Township 27 North, Range 23 West.

c. The 13 acre field is in the NE1/4 NW1/4 SW1/4 of Section 24, Township 27 North, Range 23 West.

d. An 86 acre tract in the S1/2 NW1/4 the NW1/4 SW1/4, and the S1/2 NE1/4 NW1/4, all in Section 23, will be irrigated by a wheel move sprinkler. The means of diversion is a pump on Ashley Creek in the SW1/4 SW1/4 NE1/4 of Section 23, Township 27 North, Range 23 West.

25. The Ashley Creek Ranch will use the Ashley Creek water for stockwatering approximately 400 head of livestock, cattle and horses.

26. The Conrad Land and Cattle Company, Inc. represented by Gordon Conrad will divert 1000 gallons of water per minute up to a maximum volume of 350 acre-feet of water per year for irrigation and stockwater.

27. The Conrad Land and Cattle Company, Inc., will irrigate six (6) tracts of land totaling 140 acres by applying 2.5 acre-feet of water per acre by a sprinkler system. The water will be stored from January 1 through December 31 of each year, inclusive; and used from April through October 1, of each year.

a. Mr. Conrad testified that possibly 2.5 acre-feet of water per acre was excessive, and that 1.5 acre-feet of water per acre would be adequate. (Conrad, TR., page 130).

b. Mr. Smith, soils scientist, testified that during a drought year approximately 2.23 acre-feet of water per acre would be required.

28. The point of diversion for the sprinkler systems is the NE1/4 SW1/4 SW1/4 of Section 32, Township 28 North, Range 22 West. (Application, Conrad, TR., page 176). The six (6) tracts that will be irrigated are:

a. The thirty (30) acre tract in the NW1/4 SW1/4 of Section 31, Township 28 North, Range 22 West.

(Application; Conrad, TR., page 128).

b. A forty (40) acre tract in the NE1/4 SE1/4 of Section 31, Township 28 North, Range 22 West.

(Application; Conrad, TR., page 128).

c. A twelve (12) acre tract in the NE1/4 SW1/4 of Section 31, Township 28 North, Range 22 West.

(Application, Conrad, TR., page 128).

d. A seventeen (17) acre tract in the NW1/4 NE1/4 of Section 5, Township 28 North, Range 22 West.

(Application; Conrad, TR., page 128).

e. A six (6) acre tract in the NW1/4 SW1/4 of Section 21, Township 28 North, Range 22 West. (Application; Conrad, TR., page 128).

f. A thirty-five (35) acre tract in the SW1/4 SW1/4 of Section 31, Township 28 North, Range 22 West. (Conrad, TR., page 129).

29. The Conrad Land and Cattle Company proposes to use part of the water appropriated from Ashley Creek for stockwatering approximately 125 cattle.

30. Frank Gamma and Douglas Gamma propose to purchase 2600 gallons of water per minute up to a maximum of 350 acre-

feet of water per year to be used for irrigation and stockwater. The purchased waters will be stored from January 1 through December 31 of each year, inclusive, and used from April 1 through October 1 of each year, inclusive.

31. Frank Gamma and Douglas Gamma will divert the water from Ashley Creek.

- a. A twenty-five (25) horsepower portable pump will divert water at the NW1/4 SE1/4 SW1/4 of Section 24, Township 28 North, Range 24 West.
- b. A twenty-five (25) horsepower portable pump will divert water at the SW1/4 NE1/4 NW1/4 of Section 25, Township 28 North, Range 24 West.
- c. A twenty-five (25) horsepower portable pump will divert water at the NW1/4 SE1/4 SW1/4 of Section 25, Township 28 North, Range 24 West.
- d. An eighty (80) horsepower pump will divert water at the NW1/4 SE1/4 SW1/4 of Section 25; Township 28 North, Range 24 West.
- e. An eighty (80) horsepower pump will divert water at the SW1/4 NW1/4 SE1/4 of Section 24, Township 28 North, Range 24 West.

32. Frank Gamma and Douglas Gamma will use part of the Ashley Creek water for stockwater for approximately 200 head of livestock, consisting of horses, sheep and cattle.

33. Frank Gamma and Douglas Gamma will use the Ashley Creek water for sprinkler irrigation of three hundred (300) acres of land. The places to be irrigated are:

- a. A one hundred (100) acre tract in the E1/2 of Section 25, Township 28 North, Range 24 West.
- b. A sixty (60) acre tract in the SW1/4 of Section 24, Township 28 North, Range 24 West.
- c. A one hundred and forty (140) acre tract in the SE1/4 of Section 24, Township 28 North, Range 24 West.

34. Art Hanson proposes to purchase one thousand (1000) gallons of water per minute up to a maximum of five hundred (500) acre-feet of water per year to be used for sprinkler irrigation and stockwater. The water will be stored in Ashley Lake from January 1 through December 31, inclusive of each year and used from April 1 through October 1, inclusive of each year.

35. Art Hanson will divert the water from Ashley Creek by a fifty (50) horsepower pump. The points of diversion are: (1) the NE1/4 NE1/4 SW1/4 of Section 18, Township 27 North, Range 22 West; (2) the NW1/4 NE1/4 SE1/4 of Section

18, Township 27 North, Range 22 West; and (3) the NW1/4 SW1/4 NW1/4 of Section 17, Township 27 North, Range 22 West.

36. Art Hanson will use part of the water diverted from Ashley Creek to sprinkle irrigate approximately 445 acres of lands. The tracts to be irrigated are:

- a. Approximately one hundred and sixty (160) acres to be irrigated are in the SW1/4 , the S1/2 NW1/4 and the NE1/4 NW1/4 of Section 17, Township 27 North, Range 22 West. (Hanson, TR., page 135).
- b. Approximately two hundred and eighty-five (285) acres are in the NE1/4 SE1/4, the S1/2 SE1/4 and the SE1/4 SW1/4 of Section 18, Township 24 North, Range 22 West, and the N1/2 NE1/4 and NE1/4 NW1/4 of Section 19, Township 27 North, Range 22 West. (Hanson, TR., page 135).
- c. Mr. Hanson testified on cross-examination that he was negotiating with the U.S. Fish and Wildlife Service to exchange portions of the above-described lands for federal lands, but no agreement had been reached. Mr. Hanson did not know if the parties would include the water rights in the exchange. (Hanson, TR., pages 136-138).

37. Art Hanson will use part of the water in Ashley Creek for stockwater for approximately 800 head of livestock, consisting of cattle and horses. (Application).

38. John Hyrup and Kent Hyrup will purchase 700 gallons of water per minute up to a maximum of approximately 646 acre-feet of water per year. The water will be stored from January 1 through December 31, inclusive of each year in Ashley Lake, and will be used from April 1 through October 1, inclusive, of each year. The water will be used for irrigation and stockwater.

39. The water from Ashley Creek to be used for irrigation by the Hyrups will be diverted at the NE1/4 SE1/4 NE1/4 of Section 24, Township 27 North, Range 23 West. (Application).

40. A hand line sprinkler irrigation system will be used by the Hyrups to sprinkle irrigate two hundred and sixty (260) acres. The Hyrups will apply between 2.25 to 2.5 acre-feet of water per acre from Ashley Creek. (Hyrup Direct).

a. Two hundred and twenty-two (222) acres of land will be new irrigation and receive approximately 2.5 acre-feet of water per acre. The 222 acres are:
approximately 35 acres in the NE1/4 SE1/4 of Section 24, Township 27 North, Range 23 West; forty-seven (47) acres in the SW1/4 NE1/4 and the W1/2 SE1/4 NE1/4 of Section 24, Township 27 North, Range 23 West; forty (40) acres

in the W1/2 SW1/4 of Section 19, Township 27 North, Range 22 West; and 100 acres in the NE1/4 NW1/4, SW1/4 NW1/4 and SE1/4 NW1/4 of Section 19, Township 27 North, Range 22 West. (Amended Application).

b. Thirty-eight (38) acres which have been irrigated with Mount Creek water will receive supplemental irrigation from Ashley Creek. The Mount Creek water provides approximately .33 acre-feet of water per acre. Ashley Creek water will be used to apply additional water of approximately 2.25 acre-feet of water per acre. The 38 acres to be supplementally irrigated are five (5) acres in the W1/2 W1/2 W1/2 NW1/4 of Section 19, Township 27 North, Range 27 West, and thirty-three (33) acres in the E1/2 E1/2 NE1/4 of Section 24, Township 27 North, Range 23 West. (Amended Application).

41. The Hyrups will use approximately 5.5 acre-feet of water per year from Ashley Creek for stockwater for approximately 150 head of livestock, consisting of cattle and horses. (Application).

42. Keith W. Kiser will purchase six hundred (600) gallons of water per minute up to a maximum of one hundred and sixty (160) acre-feet of water per year. The water will be stored in Ashley Lake from January 1 through December 31, inclusive, of each year and will be used from April 1 through

October 1, inclusive, of each year. The water will be used for irrigation and stockwater.

43. Keith Kiser will divert the water from Ashley Creek by a thirty (30) horsepower pump at the NW1/4 NE1/4 NW1/4 of Section 16, Township 27 North, Range 22 West. The Ashley water will be used for sprinkler irrigation of approximately fifteen (15) acres in the S1/2 NE1/4 NE1/4 of Section 17, Township 27 North, Range 22 West, and approximately sixty-five (65) acres in the N1/2 NW1/4 of Section 16, Township 27 North, Range 22 West. (Kiser Exhibit No. 1; Kiser, TR., pages 206-207; Application).

44. Keith Kiser will use part of the water from Ashley Creek for stockwater for approximately eighty (80) head of livestock, being cattle and horses.

45. Wilson and Vivian Managhan will purchase four thousand one hundred (4100) gallons of water per minute up to a maximum of one thousand four hundred and twenty-five (1425) acre-feet of water per year. The water will be stored in Ashley Lake from January 1 through December 31, inclusive, of each year from April 1 through October 1, inclusive of each year.

46. The Managhans will divert the water from Ashley Creek by a headgate and three pumps, two-fifty (50) horsepower pumps, and a one hundred (100) horsepower pump, located at the SW1/4 NW1/4 SW1/4 of Section 29, Township 28

North, Range 22 West; the NE1/4 SW1/4 NW1/4 of Section 32, Township 28 North, Range 22 West; and the SW1/4 SW1/4 SW1/4 of Section 29, Township 28 North, Range 22 West.

(Application).

47. The Monaghans will use part of the water for sprinkler irrigation to apply approximately 2.5 acre-feet of water per acre on approximately five hundred and seventy (570) acres. (Managhan, TR., page 212). The lands to be irrigated are:

a. Two hundred and seventy (270) acres in the S1/2 and NE1/4 of Section 29, Township 28 North, Range 22 West.

b. One hundred and fifty (150) acres in the SE1/4 of Section 30, Township 28 North, Range 22 West.

c. Fifty (50) acres in the S1/2 NE1/4 of Section 31, Township 28 North, Range 22 West.

d. One hundred (100) acres in the W1/2 of Section 32, Township 28 North, Range 22 West. (Maonaghan, TR., pages 210-211).

48. The Maonaghans will use part of the water from Ashley Creek for stockwater for one hundred and twenty-five (125) head of cattle.

49. Dale Seelye and Owens will purchase three hundred and sixty (360) gallons of water per minute up to a

maximum of one hundred and two and a half (102.5) acre feet of water per year. The water will be stored in Ashley Lake from January 1 through December 31, inclusive of each year, and used from April through October 1, inclusive, of each year. The water will be used for irrigation.

50. Dale Seelye and Owens will divert the water from Ashley Creek by a headgate with a fifteen (15) horsepower pump at the SW1/4 NW1/4 SW1/4 of Section 29, Township 28 North, Range 22 West.

51. Dale Seelye and Owens will use the 102.5 acre-feet of water per year to sprinkle irrigate approximately forth and eight-tenths (40.8) acres of land in the W1/2 SW1/4 of Section 29, Township 28 North, Range 22 West. (Applicant's map).

52. Richard Lienesch, will purchase three hundred and twenty (320) gallons of water per minute up to a maximum of sixty-three (63) acre-feet of water per year. The water will be stored in Ashley Lake from January 1 through December 31 inclusive, of each year and used from April 1 through October 1, inclusive, of each year. (Lienesch, TR., page 282).

53. Richard Lienesch will divert the Ashley Creek water by a thirty (30) horsepower pump in the S1/2 NE1/4 NW1/4 of Section 14, Township 28 North, Range 22 West, which means of

diversion is mutually shared and operated by L. Bernard Lund and Richard Lienesch.

54. Richard Lienesch will use the water to irrigate approximately twenty-five and five tenths (25.5) acres in the SE1/4 NW1/4 and E1/2 SE1/4 SW1/4 all in Section 14, Township 28 North, Range 22 West. (Lienesch, Exhibit No. 1; Lienesch, TR., page 279).

a. Richard Lienesch has Beneficial Water Use Permit No. 11,067-s76LJ, to appropriate 320 gallons of water per minute up to a maximum of 42.5 acre-feet per year, for seventeen (17) acres in the NW1/4 of Section 14, Township 28 North, Range 22 West. The same seventeen (17) acres irrigated under rights obtained in the Beneficial Water Use Permit No. 11,067-s76LJ will be irrigated by the purchased water. Richard Lienesch will obtain a better priority date by purchasing the A. I. D. water. (Lienesch, TR., page 282).

b. Richard Lienesch has filed an application with the Department for Beneficial Water Use Permit No. 22,618-s76LJ for three hundred and twenty (320) gallons per minute up to a maximum of twenty-one (21) acre-feet of water per year to irrigate eight and a half (8.5) acres in the NW1/4 of Section 14, Township 28 North, Range 22 West. These 8.5 acres will be irrigated by water purchased from A. I. D. (Lienesch, TR., page 283).

55. Richard Lienesch will use part of the water diverted to fill a tank to be used for stockwater for an unknown number of animals. (Lienesch, TR., page 283).

56. L. Bernard Lund will purchase three hundred and twenty (320) gallons of water per minute up to a maximum of twenty-five (25) acre-feet per year. The water will be stored in Ashley Lake from January 1 through December 31, inclusive, of each year and used from April 1 through October 1, inclusive, of each year. Mr. Lund will use the water for irrigation and stockwater.

57. L. Bernard Lund will divert the Ashley Creek water by a thirty (30) horsepower pump so the S1/2 NE1/4 NW1/4 of Section 14, Township 28 North, Range 22 West; which means of diversion is mutually shared and operated by L. Bernard Lund and Richard Lienesch. (Lund, TR., page 286).

57. L. Bernard Lund will use part of the water to sprinkle irrigate approximately ten (10) acres in the NW1/4 of Section 14, Township 28 North, Range 22 West.
(Application).

a. Mr. Lund has Beneficial Water Use Permit No. 11,068-s76LJ to appropriate three hundred and twenty (320) gallons of water per minute up to a maximum of twenty-five (25) acre-feet per year from Ashley Creek to irrigate ten (10) acres that will be irrigated with the purchased water. Mr. Lund will have a better priority

date with the purchase of A. I. D. water. (Lund, TR., page 289).

58. L. Bernard Lund will use part of the water diverted from Ashley Creek for stockwater for twelve (12) head of livestock, consisting of cattle and horses.

59. David L. Buckalew will purchase two hundred and fifty (250) gallons of water per minute up to a maximum of one hundred one and a half (101.5) acre-feet of water per year. The water will be stored from January 1 through December 31, inclusive, of each year and used from April 1 through October 1, inclusive, of each year. The water will be used for irrigation.

60. David L. Buckalew will divert Ashley Creek water by a headgate with a ten (10) horsepower pump in the NW1/4 SW1/4 SW1/4 of Section 29, Township 28 North, Range 22 West.

61. David L. Buckalew will use the water to sprinkle irrigate approximately forty and six-tenths (40.6) acres in the SE1/4 NW1/4 NE1/4 SW1/4 SE1/4 NW1/4, and NW1/4 SW1/4, all in Section 29, Township 28 North, Range 22 West.

62. Gary and Ewald Zorn will purchase three hundred (300) gallons of water per minute up to a maximum of one hundred and seventeen (117) acre-feet per year. The water will be stored from January 1 through December 31, inclusive, of each year and used from April 1 through October 1,

inclusive, of each year. The water will be used for irrigation and stockwater.

63. Gary and Ewald Zorn will divert the water from Ashley Creek by a headgate with a fifteen (15) horsepower pump in the NW1/4 NW1/4 NW1/4 of Section 32, Township 28 North, Range 22 West.

64. Gary and Ewald Zorn will use part of the water for sprinkle irrigation of approximately forty-seven (47) acres, consisting of seventeen (17) acres in the NE1/4 NE1/4 of Section 31, Township 28 North, Range 22 West, and thirty (30) acres in the NW1/4 NW1/4 of Section 32, Township 28 North, Range 22 West. (Application).

65. Gary and Ewald Zorn will use part of the water for stockwater for twenty (20) head of livestock, consisting of cattle and horses.

66. Ewald Zorn and Carolyn Miller will purchase six hundred (600) gallons of water per minute up to a maximum of two hundred and twelve (212) acre-feet of water per year. The water will be stored in Ashley Lake from January 1 through December 31, inclusive, of each year and used from April 1 through October 1, inclusive, of each year. The water will be used for irrigation and stockwater.

67. Ewald Zorn and Carolyn Miller will divert the water from Ashley Creek by a headgate with a twenty-five (25)

horsepower pump at the NW1/4 NW1/4 of Section 32, Township 28 North, Range 22 West.

68. Ewald Zorn and Carolyn Miller will use part of the water to sprinkle irrigate eighty-five (85) acres of land, which are: ten (10) acres in the NW1/4 NW1/4 NW1/4 and twenty (20) acres in the W1/2 NE1/4 NW1/4 and fifty-five (55) acres in the E1/2 NE1/4 NW1/4, all in Section 32, Township 28 North , Range 22 West.

69. Ewald Zorn and Carolyn Miller will use part of the water for stockwater for twenty-five (25) head of livestock, consisting of cattle and horses.

70. The United States Fish and Wildlife Service (U.S.F.&W.S.) will purchase one thousand nine hundred and ninety-seven (1,997) gallons of water per minute up to a maximum of one thousand four hundred and forty-five (1,445) acre-feet of water per year. The water will be stored from January 1 through December 31, inclusive, of each year and used from April 1 through October 1, inclusive, of each year. The water will be used to flood irrigate hay meadows and flood marshes for wildlife habitat.

71. The U.S.F.&W.S. will use part of the water for the Smith Lake Waterfowl Production Area (WPA). The Smith Lake WPA is naturally flooded in the spring by runoff of Ashley Creek during normal years. The additional water will provide

flooding during drought years and during the summer and fall.
(Brown, Direct).

72. The U.S.F.&W.S. will divert approximately 700 acre-feet of water per year from Ashley Creek for the Smith Lake W.P.A. by a pump, with a capacity of 500-800 gallons of water per minute, at the NE1/4 SW1/4 SW1/4 of Section 18, Township 27 North, Range 22 West. The U.S.F.&W.S. will use the water diverted, described above, to flood irrigate approximately two hundred and twenty (220) acres of land, which are:

- a. Approximately one hundred (100) acres in the N1/2 NW1/4 and SW1/4 NW1/4 of Section 17, Township 27 North, Range 22 West.
- b. Approximately forty (40) acres in the NE1/4 SE1/4 of Section 18, Township 27 North, Range 22 West.
- c. Approximately eighty (80) acres in the E1/2 NE1/4 and SW1/4 NE1/4 and NE1/4 SE1/4 of Section 16, Township 27 North, Range 22 West. (Amended Application).

73. The U.S.F.&W.S. will divert part of the water from Ashley Creek to Smith Lake by a pump, with a capacity of approximately six hundred (600) gallons of water per minute, at the NE1/4 NE1/4 SE1/4 of Section 8, Township 27 North, Range 22 West. (Brown, Direct; Amended Application). The diverted water will be used for crop production on

approximately twenty (20) acres of land in the NE1/4 NE1/4 of Section 8, Township 27 North, Range 22 West.

74. The U.S.F.&W.S. will divert approximately seven hundred and forty-five (745) acre-feet of water per year from Ashley Creek for the Batauia Waterfowl Production Area. The U.S.F.&W.S. will divert the water by a concrete dam and a headgate which is at the SE1/4 NE1/4 NW1/4 of Section 20, Township 28 North, Range 22 West. The water will be diverted to flood irrigate two hundred (200) acres of marsh and meadows, which appear to be:

- a. Approximately fifty-five (55) acres in the E1/2 NE1/4 SE1/4 and SE1/4 SE1/4 all in Section 20, Township 28 North, Range 22 West. (Applicant's map).
- b. Approximately ten (10) acres in the NW1/4 SE1/4 of Section 20, Township 28 North, Range 22 West. (Applicants Map).
- c. Approximately fifteen (15) acres in the SE1/4 NW1/4 of Section 21, Township 28 North, Range 22 West. (Applicant's map).
- d. Approximately ten (10) acres in the SE1/4 SW1/4 SE1/4 of Section 20, Township 28 North, Range 22 West. (Applicants Map).

e. Approximately ninety-five (95) acres in the SW1/4 of Section 21, Township 28 North, Range 22 West.

(Applicants Map).

f. Approximately fifteen (15) acres in the NW1/4 SE1/4 of Section 15, Township 28 North, Range 22 West.

75. Harrington and Bibler, Inc., (H. & B.) will purchase nine hundred and sixty-five (965) gallons of water per minute up to a maximum of seven hundred and seventy-eight and three-tenth (778.3) acre-feet of water per year. The water will be stored in Ashley Lake from January 1 through December 31, inclusive, of each year and used from April 1 through October 1, inclusive, of each year. The water will be used for irrigation and lake rejuvenation. The waters purchased from A. I. D. will be used in conjunction with waters purchased from Deist and subject to Department's approval of Application for Change of Appropriation Water Right No. 15,948-c76LJ, and new water rights contingent upon the Department's approval of Application for Beneficial Water Use Permit No. 17,743-s76LJ.

76. H. & B. will divert the water from Ashley Creek in the SE1/4 NW1/4 NW1/4 of Section 14, Township 28 North, Range 22 West. H. & B. will probably install two (2) pumps capable of individually pumping one thousand and forty-five (1,045) gallons of water per minute, and having a combined capacity of two thousand and ninety (2,090) gallons of water per

minute. An instantaneous flow meter would be installed in the system. (Tudor, H. & B., Tr. pages 111-112; Tudor, Letter, feb.-12, 1980).

a. During July and August, H.& B. will only divert from Ashley Creek two hundred and fifty-eight (258) acre-feet, therefore, the pumping rate for July and August will not exceed nine hundred and forty-one and five tenths (941.5) gallons of water per minute. (Tudor, Letter, Feb. 12, 1980).

b. During April, May, June and September, H. & B. will divert water from Ashley Creek at a rate of nine hundred and sixty-five (965) gallons of wter per minute. (Tudor, Letter, Feb. 12, 1980).

77. H. & B. will use approximately five hundred and fifteen (515) acre-feet of water per year for irrigation of three hundred and twenty (320) acres of alfalfa, gardens and lawns, which is in the W1/2 SE1/4 of Section 14, the S1/2 SE1/4 of Section 15, the E1/2 NE1/4 of Section 22, and the W1/2 NE1/4 of Section 23, all in Township 28 North, Range 22 West. (H. & B. Map, Direct).

a. Approximately one hundred (100) acres will be alfalfa, and the remaining two hundred and twenty (220) acres will be gardens and lawns. (Bibler, H. & B. TR. page 71).

b. Some objectors contended that the use of water for gardens and lawns in a subdivision was a less beneficial use than agriculture.

78. H. & B. will use two hundred and sixty-three and three tenth (263.3) acre-feet of water diverted from Ashley Creek each year for rejuvenation of Middle Foy's Lake and Lower Foy's Lake, which are eutrifying, and to create an impoundment below Lower Foy's Lake. The total volume required for lake rejuvenation and impoundment is three hundred and ninety-two (392) acre-feet.

a. Middle Foy's Lake has a surface area of thirty-nine (39) acres and a volume of approximately five hundred and eighty-five (585) acre-feet. (Garver letter, Aug. 17, 1977). Occasionally Upper Foy's Lake drains into Middle Foy's Lake. (Tech. Report, page 10).

b. Lower Foy's Lake has a surface area of twenty (20) acres and a volume of approximately one hundred and sixty (160) acre-feet. (Carver, Letter, Aug. 17, 1977). The overflow from Middle Foy's Lake will flow into Lower Foy's Lake. (Carver, Letter, Aug. 17, 1977).

c. The overflow from Lower Foy's Lake will be retained in an impoundment in the NE1/4 NW1/4 of Section 23, Township 28 North, Range 22 West. (H. & B. Map). The impoundment will have a surface area of approximately

six (6) acres and a volume of approximately thirty (30) acre-feet. (Carver, Letter, Aug. 17, 1977).

79. H. & B. have not decided how to control the overflow from the impoundment, but H. & B.'s engineer suggested that a gate valve with a throttling device on the pipe may be used. (Tudor, H. & B., TR., page 83).

a. Middle Foy's Lake will be raised approximately three (3) feet, to it's spillpoint. (Bibler, H. & B. TR., page 62).

b. Water levels in Middle Foy's and Lower Foy's Lakes are highest during June and July. (Bibler, H. & B. TR., page 16).

c. The impoundment to be constructed will be used for storage, approximately six (6) acre-feet will be available for storage, although design modifications could be made to increase the storage to nine (9) acre-feet. (Bibler, H. & B. TR., pages 30, 69; Tudor, Letter, Feb. 6, 1980).

(1) The engineer for H. & B. testified that flows from the impoundment would not increase suddenly if there were heavy rains or early spring thaws. (Tudor, H. & B. TR., page 86).

80. The overflow from the H. & B. impoundment will be approximately 300 to 350 gallons of water per minute, and

will flow northeast through an old intermittent channel to Ashley Creek. (Tudor, TR., pages 146, 147, 198, and Bibler, H. & B. TR., page 50). The remaining portion of the water, approximately 2,066.5 to 2,090 gallons of water per minute, that will be diverted, will be consumed by irrigation, stored, or evaporated. (Carver, Letter, Aug. 17, 1977; Tudor, H. & B. TR., page 86, Tudor, TR., page 141).

a. The overflow channel is approximately one (1) foot deep, and only flows in normal years during spring runoff. (Bibler, H. & B., TR., pages 49-50). The overflow channel has an estimated one and two-tenths percent (1.2%) gradient. (Bibler and Tudor, TR., page 157).

(1) The engineer for H. & B. hypothesized that a channel with a 1.2% gradient, if it were one (1) foot deep and if it had a uniform width of four (4) feet, had a capacity for fourteen (14) cubic feet of water per second or six thousand two hundred and ninety (6,290) gallons of water per minute. (Tudor, Letter, Feb. 6, 1980).

(2) The water in the channel has been observed to be a depth of three (3) to four (4) inches. (McNeil, H. & B., TR., page 155).

(3) The engineer for H. & B. testified that the overflow channel was poorly defined in the lower

areas, was overgrown with vegetation in areas, and that water in the channel would overflow onto pastures. (Tudor, H. & B., TR., page 115).

(4) The engineer for H. & B. measured the ice in the overflow channel during the winter of 1980 and found it was approximately ten (10) to twelve (12) inches deep. (Tudor Map, Letter, Feb. 6, 1980; Tudor, H. & B. TR., page 82). The engineer estimated the flow, prior to freezing, was approximately six hundred (600) gallons of water per minute. (Tudor, H. & B. TR., page 82).

b. The overflow channel has not carried overflow from Lower Foy's Lake since about 1940 or 1950. During the past forty (40) years the lands adjacent to the overflow channel have had buildings constructed upon them. (Bibler, H. & B. TR., pages 32, 40).

c. Whether the overflows into the channel will be at a constant or fluctuating rate is undetermined.

(1) Mr. Bibler testified that overflow into the channel would be at a constant rate of approximately three hundred (300) gallons of water per minute. (Bibler, H. & B. TR., page 50).

(2) The direct testimony submitted stated: "The overflow would be closed during the spring runoff

period to retain all surface runoff from the area above Lake Shore Drive ...; and the overflow would not exceed the historic spring runoff at any time." (H. & B. Direct).

81. Objectors to the H. & B. project are downstream property owners along the overflow channel. Objectors, McNeil and the Kalispell Christian Church, are in the S1/2 SW1/4 of Section 13, Township 28 North, Range 22 West. (Church & McNeil Direct).

- a. The groundwater level on objectors premises rises only during the spring runoff, so water is visible on the surface in the spring. (Church Direct).
- b. The soils on the objector's property and around the overflow channel are poorly drained. (Tudor, TR., page 151).
- c. The United States Soil Conservation has identified areas of saline seep near the overflow channel; one saline seep area is immediately east of the Objector's property. (DNRC. Technical Report, page 9; Tudor, TR., pages 167, 174).
- d. The engineer for H. & B. testified that the overflow channel would be a losing stream; water would be lost from the channel to the surrounding banks. (Tudor, H. & B. TR., pages 115-116).

82. The level of the bottom of the crawl space in the church was approximately the same level as the ice in the overflow channel during the winter of 1980.

(1) The engineer for H. & B. reported that the crawl space of the church had been excavated "to an elevation of 0.15 feet lower than the ice in the channel." (Tudor, Letter, Feb. 6, 1980).

(2) The objector testified that during the spring there would be water in the crawl space. (McNeil, TR., page 143).

(3) The objector testified that a continuous pool of water in the crawl space will raise the humidity and might cause the wood structures to rot. (McNeil, H. & B. TR., page 158).

83. The overflow channel requires improvements before three hundred (300) to three hundred and fifty (350) gallons of water per minute can be discharged through the channel without affecting downstream or property owners.

a. Objector McNeil testified that excavation of the channel, or lining or tiling the channel may eliminate the adverse effects. (McNeil, H. & B. TR., page 157).

b. H. & B. testified that the culvert for the overflow channel on McNeil's property should be re-aligned.

(Bibler, H. & B. TR., page 170). H. & B. testified that

they would aid in improving the overflow channel.

(Bibler, H. & B., TR. page 171).

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are made:

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-403 (3) provides that:

"Without obtaining prior approval from the Department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The Department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons."

2. The Ashley Irrigation District appears to be entitled to a flow right of one hundred and twenty-five (125) cubic feet of water per second and a volume of nineteen thousand three hundred and eighteen (19,318) acre-feet of water per year from Ashley Lake and Ashley Creek, which right is based upon the acquisition, appropriation and actual use of four water appropriation claims, to wit:

(1) 20,000 miners inches of water from Ashley Creek, February 1, 1897;

(2) 5,000 miners inches of water from Ashley Creek, March 6, 1897;

(3) 125 cubic feet of water per second from Ashley Creek, August 15, 1910; and

(4) 500 cubic feet of water per second from Ashley Lake, August 15, 1910.

3. Abandoning and obstructing the flow of water in the Ashley Irrigation ditch in the NW1/4 of Section 15, Township 28 North, Range 22 West, M.P.M., Flathead County, will not have significant adverse affects on the environment. Objectors Sappington and Gustafson, contended that ceasing flows in the seventy (70) year old ditch would cause the ditch's riparian vegetation to die and delete a source of water for wildlife. The Objectors also contended that it was a burden to have an empty ditch remain on their property, even though the Ashley Irrigation District will deed the easements back to the landowners. Neither of these objections is sufficient reason to deny the Ashley Irrigation District's Sever and Sell of Water Rights. Any deleterious affects resulting from the cessation of flows in the Ashley Irrigation Ditch are outweighed by the beneficial environmental affects resulting from restoring Ashley Creek to a flowing stream.

4. The proposed sever and sell of Ashley Irrigation District's water rights will not adversely affect the rights of others. The rights of prior appropriators will be

protected if any permits granted hereby are conditioned,
limited and modified so as to protect those rights.

a. Objector Sappington contended that he had a valid right to use water in the Ashley Irrigation Ditch because he owned property adjacent to the stream. Montana has rejected the doctrine of riparian water rights, and since the Bannack Statutes of 1865 adopted the doctrine of prior appropriation. Mettler v. Ames Realty, 61 Mont. 152, 170-171, 201 P. 702 (1921).

Therefore, Mr. Sappington's claims for riparian rights are rejected.

b. Objector O'Neil claimed that their water right with an earlier priority date than the Ashley Irrigation District's water rights may be adversely affected if the sever and sell were approved. Mr. O'Neil has signed the Amended Purchase and Management Agreement, which provides for releases of water from Ashley Lake to fulfill Mr. O'Neil's rights.

c. The Purchase and Management Agreement, as amended, signed by all purchasers of Ashley Irrigation District water delegates the Montana Department of Fish and Wildlife and Parks as the regulator of releases from Ashley Lake and flows in Ashley Creek. This coordination by the purchasers will minimize conflicts between the purchasers.

5. The main diversion works on Ashley Lake, a dam and three headgates, in the NW1/4 NW1/4 NE1/4 of Section 23, Township 28 North, Range 24 West may not meet dam safety specifications.

6. The Ashley Irrigation District's sale to the Montana Department of Fish, Wildlife and Parks of 9,540 acre-feet of water per year from Ashley Lake storage to be released into Ashley Creek from January 1 through December 31, inclusive, of each year to provide instream flows for fish, wildlife and recreation will not adversely affect the rights of others.

7. The Ashley Irrigation Districts sale to the Montana Department of Fish, Wildlife and Parks of a portion of its water right, amounting to 1,908 acre-feet of water per year to be stored in Ashley Lake and released to dilute sewage discharges in Ashley Creek in the SW1/4 of Section 20, Township 28 North, Range 21 West, will not adversely affect the rights of others.

8. The Ashley Irrigation District's sale of part of its water right, to the Ashley Creek Ranch, Inc., being 1800 gallons of water per minute up to a maximum of 800 acre-feet per year from Ashley Creek to be diverted from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

9. The Ashley Irrigation District's sale to Conrad Land and Cattle Company, Inc. of a part of its water rights, being

1000 gallons of water per minute up to a maximum of 350 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

10. The Ashley Irrigation District's sale to Frank Gamma and Douglas Gamma of a part of its water right, being 2600 gallons of water per minute up to a maximum of 350 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

11. The Ashley Irrigation District's sale of part of its water right to Art Hanson, being 1000 gallons of water per minute up to a maximum of 500 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

12. The Ashley Irrigation District's sale of a part of its water, to John Hyrup and Kent Hyrup, being 700 gallons of water per minute up to a maximum of 646 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

13. The Ashley Irrigation District's sale of a part of its water rights to Keith Kiser, said sale being 600 gallons of water per minute up to a maximum of 160 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

14. The Ashley Irrigation District's sale of part of its water rights to Wilson and Vivian Managhan, said sale being 4100 gallons of water per minute up to a maximum of 1425 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

15. The Ashley Irrigation District's sale of part of its water rights to Dale Seelye and Owens, said sale being of 360 gallons of water per minute up to a maximum of 102.5 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October, inclusive, of each year will not adversely affect the rights of others.

16. The Ashley Irrigation District sale of part of it's water rights to Richard Lienesch, said sale being of 320 gallons of water per minute up to a maximum of 63 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation

and stockwater, will not adversely affect the rights of others.

17. The Ashley Irrigation District's sale of part of its water rights to L. Bernard Lund, said sale being of 320 gallons of water per minute up to a maximum of 25 acre-feet of water per year to be diverted from April 1 thorough October 1, inclusive, of each year for irrigation and stockwater will not adversely affect the rights of others.

18. The Ashley Irrigation District's sale of part of its water rights to David L. Buckalew, said sale being of 250 gallons of water per minute up to a maximum of 101.5 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation, will not adversely affect the rights of others.

19. The Ashley Irrigation District's sale of part of its water rights to Gary and Ewald Zorn, said sale being of 300 gallons of water per minute up to a maximum of 117 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

20. The Ashley Irrigation District's sale of part of its water rights to Ewald Zorn and Carolyn Miller, said sale being of 600 gallons of water per minute up to a maximum of 212 acre-feet of water per year to be diverted from Ashley

Creek from April 1 through October 1, inclusive, of each year for irrigation and stockwater, will not adversely affect the rights of others.

21. The Ashley Irrigation District's sale of part of its water rights to the United States Fish and Wildlife Service, said sale being of 1,997 gallons of water per minute up to a maximum of 1,445 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for flooding meadows and marshes of the Smith Waterfowl Production Area and the Batauia Waterfowl Production Area, will not adversely affect the rights of others.

22. The Ashley Irrigation District's sale of part of its water rights to Harrington and Bibler, Inc., said sale being of 965 gallons of water per minute up to a maximum of 778.3 acre-feet of water per year to be diverted from Ashley Creek from April 1 through October 1, inclusive, of each year for irrigation and rejuvenation, may adversely affect the rights of others. The adverse affects from the sale and use of Harrington and Bibler, Inc., would be because overflows and discharges from the impoundment cannot be adequately regulated given the present design, and discharges into the old channel, in its present unimproved condition, may adversely affect the rights of others adjacent to the channel.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions, modifications and limitations imposed below, the Ashley Irrigation District's Application to Sever and Sell Water Right No. 14,607-ss76LJ to the Montana Department of Fish, Wildlife and Parks, Ashley Creek Ranch, Inc., David Buckalew, Conrad Land and Cattle Company, Art Hanson, Harrington and Bibler, Inc., Keith Kiser, Wilson and Vivian Managhan, John and Kent Hyrup, Richard Lienesch, L. Bernard Lund, Dale Seelye and Owens, Gary and Ewald Zorn, Ewald Zorn and Carolyn Miller, and the United States Fish and Wildlife Service is hereby approved.

2. The approval of this sever and sell and the concomitant Applications for Change of Appropriation Water Rights is not to be construed as recognition by the Department of Natural Resources and Conservation of the water rights involved. All water rights are subject to possible modification under the adjudication proceedings pursuant to Section 85-2-211 et. seq., M.C.A., 1979.

3. This is to inform you, the Purchasers, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is the

Indian Tribes position that economic investments made in association with the appropriation water rights, do not create in the appropriators any equity or vested right against the Indian Tribes.

4. The approval to Sever and Sell Water Right No. 14,607-ss76LJ is granted subject to all prior rights in the source of supply.

5. The approval to Sever and Sell Water Right No. 14,607-ss76LJ is subject to the Purchasers' acceptance and compliance with the Purchase and Management Agreement, as amended in March, 1980.

6. The Purchasers shall, within a reasonable and prudent period of time, construct the modifications and install the devices on the Ashley Lake diversion and impoundment structure which are deemed necessary for safe operation of the Ashley Lake structures.

7. The Purchasers shall install and maintain adequate measuring devices on Ashley Lake to enable the Purchasers to keep a record of all quantities of water released from Ashley Lake, as well as the periods of such releases from Ashley Lake. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

8. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell (Proposed Order, Sections 1-7) and the conditions, modification and limitations imposed below, the Montana Department of Fish, Wildlife and Parks' Application for Change of Appropriation Water Right is hereby granted, allowing appropriation of 9,540 acre-feet of water per year to be stored in Ashley Lake from January 1 through December 31, inclusive, of each year and to be released from the Ashley Lake impoundment from January 1 through December 31, inclusive, into Ashley Creek for instream flows for fish, wildlife and recreation.

9. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the Montana Department of Fish, Wildlife and Parks' Application for Change of Water Appropriation Right is hereby granted, allowing appropriation of 1,908 acre-feet of water per year to be stored in Ashley Lake from January 1 through December 31, inclusive, of each year and to be released from Ashley Lake from January 1 through December 31, inclusive of each year, to flow in Ashley Creek from the SW1/4 of Section 20, Township 28 North, Range 21 West to the confluence with the Flathead River to dilute the sewage discharges of Kalispell.

10. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the Ashley Creek Ranch, Inc. Application for Change of Appropriation Water Right is hereby granted, allowing appropriation of 1800 gallons of water per minute up to a maximum of 800 acre-feet of water per year to be diverted and used from Ashley Creek from April 1 through October 1, inclusive, of each year and to be used for irrigation on a total of 400 acres, more or less, and stockwater for 400 animals. The water is to be diverted at the following points: The SW1/4 NW1/4 NW1/4 of Section 23; the NE1/4 SE1/4 SW1/4 of Section 15; the NW1/4 NW1/4 NW1/4 NE1/4 of Section 22; the NE1/4 SE1/4 SW1/4 of Section 15; and the SW1/4 SW1/4 NE1/4 of Section 23; all in Township 27 North, Range 23 West. The 400 acres to be irrigated are: 27.5 acres in the SW1/4 NW1/4 of Section 23; 39 acres in the SE1/4 SW1/4 of Section 15, NE1/4 NE1/4 of Section 22, and S1/2 NW1/4 NW1/4 of Section 23; 40 acres in the NW1/4 NE1/4 and SE1/4 NE1/4 of Section 22; 126.5 acres in the NW1/4 NW1/4 of Section 24 and SE1/4 NE1/4 of Section 23; 46 acres in the SW1/4 SE1/4 and NE1/4 SW1/4 of Section 15; 12 acres in the S1/2 S1/2 S1/2 SW1/4 of Section 13 and N1/2 N1/2 N1/2 NW1/4 of Section 24; 13 acres in the NE1/4 NW1/4 SW1/4 of Section 24; and 86 acres in the S1/2 NW1/4, NW1/4 SW1/4, and NE1/4 NW1/4 of Section 23; all in Township 27 North, Range 23 West.

a. The Ashley Creek Ranch, Inc. shall install and maintain adequate measuring devices to enable the Ashley Creek Ranch to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

11. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order Sections 1-7) and the conditions, modifications and limitations imposed below, the Conrad Land and Cattle Co., Inc. Application for Change of Appropriation Water Right is hereby granted, allowing appropriation of 1000 gallons of water per minute up to a maximum of 350 acre-feet per year to be diverted from Ashley Creek at a point in the NE1/4 SW1/4 SW1/4 of Section 32, Township 28 North, Range 22 West, and used from April 1 through October 1, inclusive, of each year for stockwater for approximately 125 cattle and for irrigation on a total of 140 acres, more or less, being: 30 acres in the NW1/4 SW1/4 of Section 31; 40 acres in the NE1/4 SE1/4 of Section 31; 12 acres in the NE1/4 SW1/4 of Section 31; 17 acres in the NW1/4 NE1/4 of Section 5; 6 acres in the NW1/4 SW1/4 of Section 21; and 35 acres in the SW1/4 SW1/4 of Section 31; all in Township 28 North, Range 22 West.

a. The Conrad Land and Cattle Company, Inc. shall install and maintain adequate measuring devices to enable the Conrad Land and Cattle Company to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

12. Subject to the conditions, modifications and limitations imposed in the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Frank Gamma and Douglas Gamma for Change of Appropriation Water Right is hereby granted, allowing appropriation of 2600 gallons of water per minute up to a maximum of 350 acre-feet of water per year to be diverted from Ashley Creek and used from April 1 through October 1, inclusive, of each year for irrigation of a total of 300 acres, more or less, and stockwater for approximately 200 head of livestock. The water will be diverted at the following points: the NW1/4 SE1/4 SW1/4 of Section 24; the SW1/4 NE1/4 NW1/4 of Section 25; NW1/4 SE1/4 SW1/4 of Section 25; NW1/4 SE1/4 SW1/4 of Section 25; and the SW1/4 NW1/4 SE1/4 of Section 24; all in Township 28 North, Range 24 West. The 300 acres to be irrigated are: 100 acres in the E1/2 of Section 25; 60 acres in the SW1/4 of Section 24; and 140

acres in the SE1/4 of Section 24; all in Township 28 North, Range 24 West.

a. Frank Gamma and Douglas Gamma shall install and maintain adequate measuring devices to enable Frank Gamma and Douglas Gamma to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation upon demand by the Department.

13. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Art Hanson for Change of Appropriation Water Right is hereby granted, allowing appropriation of 1000 gallons of water per minute up to a maximum of 500 acre-feet of water per year to be diverted from Ashley Creek and used from April 1 through October 1, inclusive, of each year for irrigation of a total of 445 acres, more or less, and for stockwater for approximately 800 head of livestock. The water will be diverted at the following points: NE1/4 NW1/4 SW1/4 of Section 18; NW1/4 NE1/4 SE1/4 of Section 18; and the NW1/4 SW1/4 NW1/4 of Section 17; all in Township 27 North, Range 22 West. The 445 acres to be irrigated are: 160 acres in the SW1/4, the S1/2 NW1/4 and the NE1/4 NW1/4 of Section 17; and 285 acres in the

NE1/4 SE1/4, S1/2 SE1/4 and the SE1/4 SW1/4 of Section 18,
and the N1/2 NE1/4 and the NE1/4 NW1/4 of Section 19; all in
Township 27 North, Range 22 West.

a. Art Hanson shall install and maintain adequate
measuring devices to enable him to keep a record of the
flow rate and volume of water diverted, and the periods
of such diversion and use. Such records shall be
presented to the Department of Natural Resources and
Conservation for inspection upon demand by the
Department.

14. Subject to the conditions, modifications and
limitations imposed on the approval of the Sever and Sell of
Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7)
and the conditions, modifications and limitations imposed
below, the application of John Hyrup and Kent Hyrup for
Change of Appropriation Water Right is hereby granted,
allowing appropriation of 700 gallons of water per minute up
to a maximum of 646 acre-feet of water per year to be
diverted from Ashley Creek at a point in the NE1/4 SE1/4
NE1/4 of Section 24, Township 27 North, Range 23 West, and
used from April 1 through October 1, inclusive, of each year
for irrigation of a total of 260 acres, more or less, and for
stockwater for approximately 150 head of livestock. The 260
acres to be irrigated are: 35 acres in the NE1/4 SE1/4 of
Section 24, Township 27 North, Range 23 West; 47 acres in the
SW1/4 NE1/4 and the W1/2 SE1/4 NE1/4 of Section 24, Township

27 North, Range 23 West; 40 acres in the W1/2 SW1/4 of Section 19, Township 27 North, Range 22 West; 100 acres in the NE1/4 NW1/4, the SW1/4 NW1/4 and SE1/4 NW1/4 of Section 19, Township 27 North, Range 22 West; 5 acres in the W1/2 W1/2 NW1/4 of Section 19, Township 27 North, Range 22 West; and 33 acres in the E1/2 E1/2 NE1/4 of Section 24, Township 27 North, Range 23 West.

a. John Hyrup and Kent Hyrup shall install and maintain adequate measuring devices to enable them to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

15. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Keith W. Kiser for Change of Appropriation Water Right is hereby granted, allowing appropriation of 600 gallons of water per minute up to a maximum of 160 acre-feet of water per year to be diverted from Ashley Creek at a point in the NW1/4 NE1/4 NW1/4 of Section 16, Township 27 North, Range 22 West, and used from April 1 through October 1, inclusive, of each year for irrigation on a total of 80 acres and for stockwater for 80

head of livestock. The 80 acres to be irrigated are: 15 acres in the S1/2 NE1/4 NE1/4 of Section 17; and 65 acres in the N1/2 NW1/4 of Section 16; both in Township 27 North, Range 22 West.

a. Keith Kiser shall install and maintain adequate measuring devices to enable him to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

16. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditons, modifications and limitations imposed below, the application of Wilson and Vivian Managhan for Change of Appropriation Water Right is hereby granted, allowing appropriation of 4100 gallons of water per minute up to a maximum of 1425 acre-feet of water per year to be diverted from Ashley Creek and used from April 1 through October 1, inclusive, of each year for irrigation of a total of 570 acres, more or less, and for stockwater for approximately 125 head of livestock. The water will be diverted at the following points: the SW1/4 NW1/4 SW1/4 of Section 29; the NE1/4 SW1/4 NW1/4 of Section 32; and the SW1/4 SW1/4 SW1/4 of Section 29; all in Township 28 North,

Range 22 West. The 570 acres to be irrigated are: 270 acres in the S1/2 and the NE1/4 of Section 29; 150 acres in the SE1/4 of Section 30; 50 acres in the S1/2 NE1/4 of Section 31; and 100 acres in the W1/2 of Section 32; all in Township 28 North, Range 22 West.

a. Wilson and Vivian Managhan shall install and maintain adequate measuring devices to enable them to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

17. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Dale Seelye and Owens for Change of Appropriation Water Right is hereby granted, allowing appropriation of 360 gallons of water per minute up to a maximum of 102.5 acre-feet of water per year to be diverted from Ashley Creek at a point in the SW1/4 NW1/4 SW1/4 of Section 29, Township 28 North, Range 22 West, and to be used for irrigation on 40.8 acres of land in the W1/2 SW1/4 of Section 29, Township 28 North, Range 22 West.

a. Dale Seelye and Owens shall install and maintain adequate measuring devices to enable them to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

18. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Richard Lienesch, M.D., for Change of Appropriation Water Right is hereby granted, allowing appropriation of 320 gallons of water per minute up to a maximum of 63 acre-feet per year to be diverted from Ashley Creek at a point in the S1/2 NE1/4 NW1/4 of Section 14, Township 28 North, Range 22 West, and to be used from April 1 through October 1, inclusive of each year for irrigation of 25.5 acres of land in the SE1/4 NW1/4 and E1/2 SE1/4 SW1/4 of Section 14, Township 28 North, Range 22 West, and stockwater.

a. Richard Lienesch shall install and maintain adequate measuring devices to enable him to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and

Conservation for inspection upon demand by the Department.

19. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of L. Bernard Lund for Change of Appropriation Water Right is hereby granted, allowing appropriation of 320 gallons of water per minute up to a maximum of 25 acre-feet of water per year to be diverted from Ashley Creek at a point in the S1/2 NE1/4 NW1/4 of Section 14, Township 28 North, Range 22 West, and to be used from April 1 through October 1, inclusive, of each year for irrigation of 10 acres in the NW1/4 of Section 14, Township 28 North, Range 22 West, and for stockwater for 12 head of livestock.

a. L. Bernard Lund shall install and maintain adequate measuring devices to enable him to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

20. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of

Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of David L. Buckalew for Change of Appropriation Water Right is hereby granted, allowing appropriation of 250 gallons of water per minute up to a maximum of 101.5 acre-feet of water per year to be diverted from Ashley Creek at a point in the NW1/4 SW1/4 SW1/4 of Section 29, Township 28 North, Range 22 West, and to be used from April 1 through October 1, inclusive, of each year for irrigation of 40.6 acres in the SE1/4 NW1/4, the NE1/4 SW1/4, the SE1/4 SW1/4 and the NW1/4 SW1/4 of Section 29, Township 28 North, Range 22 West.

a. David L. Buckalew shall install and maintain adequate measuring devices to enable him to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

21. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Gary and Ewald Zorn for Change of Appropriation Water Right is hereby granted, allowing appropriation of 300 gallons of water per minute up to a

maximum of 117 acre-feet of water per year to be diverted from Ashley Creek at a point in the NW1/4 NW1/4 NW1/4 of Section 32, Township 28 North, Range 22 West, and to be used from April 1 through October 1, inclusive, of each year for irrigation of a total of 47 acres, more or less and stockwater for 20 head of livestock. The 47 acres to be irrigated are: 17 acres in the NE1/4 NE1/4 of Section 31; and 30 acres in the NW1/4 NW1/4 of Section 32; all in Township 28 North, Range 22 West.

a. Gary and Ewald Zorn shall install and maintain adequate measuring devices to enable them to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

22. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below the application of Ewald Zorn and Carolyn Miller for Change of Appropriation Water Right is hereby granted, allowing appropriation of 600 gallons of water per minute up to a maximum of 212 acre-feet of water per year to be diverted from Ashley Creek at a point in the NW1/4 NW1/4 of Section 32, Township 28 North, Range 22 West, and to be used

from April 1 through October 1, inclusive, of each year for irrigation of a total of 85 acres, more or less, and for stockwater for 25 head of livestock. The 85 acres to be irrigated are: 10 acres in the NW1/4 NW1/4 NW1/4 of Section 32; 20 acres in the W1/2 NE1/4 NW1/4 of Section 32; and 55 acres in the E1/2 NE1/4 NW1/4 of Section 32; all in Township 28 North, Range 22 West.

a. Ewald Zorn and Carolyn Miller shall install and maintain adequate measuring devices to enable them to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

23. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of the United States Fish and Wildlife Service for Change of Appropriation Water Right is hereby granted, allowing appropriation of 1,997 gallons of water per minute up to a maximum of 1,445 acre-feet of water, per year to be diverted from Ashley Creek and used from April 1 through October 1, inclusive, of each year to flood irrigate 420 acres of meadows and marshes for wildlife habitat. The water is to be diverted at the following

points: NE1/4 SW1/4 SW1/4 of Section 18, Township 27 North, Range 22 West; and the SE1/4 NE1/4 NW1/4 of Section 20, Township 28 North, Range 22 West. The 420 acres to be irrigated are: 100 acres in the N1/2 NW1/4 and SW1/4 NW1/4 of Section 17, Township 27 North, Range 22 West; 40 acres in the NE1/4 SE1/4 of Section 18, Township 27 North, Range 22 West; 80 acres in the E1/2 NE1/4, the SW1/4 NE1/4 and the NE1/4 SE1/4 of Section 16, Township 27 North, Range 22 West; 55 acres in the E1/2 NE1/4 SE1/4 and the SE1/4 SE1/4 of Section 20, Township 28 North, Range 22 West; 10 acres in the NW1/4 SE1/4 of Section 20, Township 28 North, Range 22 West; 15 acres in the SE1/4 NW1/4 of Section 21, Township 28 North, Range 22 West; 10 acres in the SE1/4 SW1/4 SE1/4 of Section 20, Township 28 North, Range 22 West; 95 acres in the SW1/4 of Section 21, Township 28 North, Range 22 West; and 15 acres in the NW1/4 SE1/4 of Section 15, Township 28 North, Range 22 West.

a. The United States Fish and Wildlife Service shall install and maintain adequate measuring devices to enable the Service to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

24. Subject to the conditions, modifications and limitations imposed on the approval of the Sever and Sell of

Water Right No. 14,607-ss76LJ (Proposed Order, Sections 1-7) and the conditions, modifications and limitations imposed below, the application of Harrington and Bibler, Inc. for Change of Appropriation Water Right is hereby granted, allowing appropriation of 965 gallons of water per minute up to a maximum of 778.3 acre-feet of water per year to be diverted from Ashley Creek at a point in the SE1/4 NW1/4 NW1/4 of Section 14, Township 28 North, Range 22 West, and to be used from April 1 through October 1, inclusive, of each year for irrigation of a total of 320 acres, more or less, for rejuvenation of Middle Foy's Lake, Lower Foy's Lake, and construction of an impoundment. The 320 acres to be irrigated are in the W1/2 SE1/4 of Section 14, the S1/2 SE1/4 of Section 15, the E1/2 NE1/4 of Section 22 and the W1/2 NE1/4 of Section 23, all in Township 28 North, Range 22 West.

a. Harrington and Bibler, Inc. shall install and maintain adequate measuring devices to enable Harrington and Bibler, Inc. to keep a record of the flow rate and volume of water diverted, and the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

b. Prior to constructing the impoundment, Harrington and Bibler, Inc., shall obtain the approval of the Department of Natural Resources and Conservation. Harrington and Bibler, Inc. shall submit to the

Department detailed engineering plans and specifications for construction of the impoundment, which plans must include an adequate system for controlling the discharge of water from the impoundment.

c. Harrington and Bibler shall limit discharges of water from the impoundment to 350 gallons of water per minute. Harrington and Bibler shall install and maintain adequate measuring devices to enable Harrington and Bibler, Inc. to keep a record of the flow rate and volume of water discharged, and the periods of such discharges. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

d. Harrington and Bibler, Inc. shall present plans for improving the old stream channel, where the necessity for improvement exists, so that the channel is capable of carrying discharges of 350 gallons of water per minute.

e. The granting of the Change for Appropriation Water Right in no way grants Harrington and Bibler, Inc. any right to violate the real property rights of any other party, nor does it excuse Harrington and Bibler, Inc. from any liability for the same, even if such violation is an unavoidable consequence of exercising the Change of the Appropriation Water Right.

f. The granting of the Change for the Appropriation Water Right in no way reduces or alters Harrington and Bibler's liability for damage caused by their exercise of the Water Rights changed, nor does the Department in granting Change of the Appropriation Water Right in any way acknowledge liability for damage caused by Harrington and Bibler's exercise of the water rights changed.

NOTICE

This is a Proposed Decision and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation.

Written exceptions to the Proposal for Decision, if any, shall be filed with the Hearing Examiner within fifteen (15) days of receipt of service.

DATED this 21st day of November, 1980.



RONDA L. SANDQUIST
HEARING EXAMINER
32 S. Ewing
Helena, Montana 59601